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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 31

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, PETITIONER

v.

UNITED AIR LINES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Ohio (R. 127) is not reported. The opinion of the United States Court of Appeals for the Sixth Circuit (R. 131) is reported at 325 F. 2d 576.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1963 (R. 131). The petition for a writ of certiorari was filed on January 31, 1964, and granted on April 20, 1964, 377 U.S. 903. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, when two air carriers merge, the district courts have jurisdiction to consider the continuing effect upon the survivor of a collective bargaining agreement which had been negotiated with one of the carriers before the merger.

STATUTE INVOLVED

The relevant portions of the Railway Labor Act (Act of May 20, 1926, 44 Stat. 577, as amended, 45 U.S.C. 151, *et seq.*) are set out in the Appendix, *infra*.

INTEREST OF THE UNITED STATES

The question posed by this case is whether, following a merger of two air carriers, the district court had jurisdiction to determine the effect upon the surviving corporation of a collective bargaining agreement negotiated pursuant to the Railway Labor Act between the union and one of the predecessor carriers. The courts below held not, on the ground that the suit was, in reality, a representation dispute under Section 2, Ninth, of the Railway Labor Act (45 U.S.C. § 152, Ninth) and thus within the exclusive jurisdiction of the National Mediation Board. The National Mediation Board, however, is of the view that it lacks authority to resolve the matter. The Board believes (a) that the dispute does not fall within Section 2, Ninth, of the Act and (b) that the proper forum for the resolution of the merits of this dispute is an appropriate adjustment board established pursuant to Section 204 of the Railway Labor Act (45 U.S.C. § 184). Thus, the decision below runs counter to the Board's construction of its own jurisdiction under the Railway

Labor Act. This memorandum is filed in order to explain the Board's position and, more broadly, because it is important to the stability of other agreements negotiated under the Act that there be a determination of the proper forum for the resolution of similar disputes.

STATEMENT

Full statements of the history of these proceedings appear in the briefs of the parties. We confine ourselves here to those essentials which are necessary to provide a sufficient background for the discussion which follows.

The action was brought by the Brotherhood of Railway and Steamship Clerks (the Brotherhood) against United Air Lines (United) to enforce against United a collective bargaining agreement originally entered into between the Brotherhood and Capital Airlines (Capital). The Brotherhood asserts that United, Capital's successor as a consequence of a merger of the two airlines, is bound by this agreement; United, which contends that it is not subject to the agreement, has refused to apply it in any respect whatever to approximately 2,700 employees who were admittedly covered by the agreement while employed by Capital.[1] The Brotherhood seeks declaratory relief and an in-

[1] The 2,700 employees have been divided by United into two units for purposes of labor relations. About 500 of the employees have been placed in a unit represented by the International Association of Machinists, which already contained about 2,200 United employees. The remaining 2,200 Capital employees have been placed in a unit along with 7,800 United employees who are not represented by a labor organization but are governed by United's personnel regulations (R. 51).

junction prohibiting United from refusing to apply the agreement's provisions to the former Capital employees (R. 11).

The merger between Capital and United which gave rise to this dispute was consummated on June 1, 1961, with the approval of the Civil Aeronautics Board (CAB). (33 C.A.B. 307; see Section 408 of the Federal Aviation Act of 1958, 49 U.S.C. § 1378). Previously, in 1947, the Brotherhood had been certified by the National Mediation Board (the Board) under Section 2, Ninth, of the Railway Labor Act (45 U.S.C. § 152, Ninth) as the representative of Capital's clerical, office, stores, fleet, and passenger service employees (R. 4). The collective agreement between the Brotherhood and Capital covering those employees was executed on August 3, 1959, less than two years before the merger; it provided that all of its provisions "shall be binding upon the successors or assigns of the Company [Capital] and in case of a consolidation or merger, the Company will notify the Brotherhood at least ninety (90) days prior to such consolidation or merger, and representatives of the Company and the Brotherhood will meet and negotiate for the procedure to be followed and the protection to be afforded the employees involved" (R. 5, 24). The merger agreement subsequently provided that "United * * * shall be subject to all of the restrictions, disabilities and duties of each of the Constituent Corporations * * * and all debts, liabilities and duties of each of the Constituent Corporations shall thenceforth attach to United, and may be enforced against it to the same extent as if said debts, liabilities and duties had been

incurred or contracted by it" (R. 5–6). Despite these provisions, United has consistently taken the position that the Brotherhood-Capital collective bargaining agreement would not survive the merger and that it is free to treat Capital's former employees as though there had been no agreement (R. 6–9).

In light of United's announced position, the Brotherhood requested the CAB, while the merger was pending before it, to "condition" the merger upon United's explicit assumption of Capital's obligations under the collective agreement. The CAB refused to impose such a condition in approving the merger, and ruled that the matter was "a problem to be worked out between the companies and the employees, in accordance with regular procedures applicable to the matter of representation and agreement." 33 C.A.B. 307, 331. Thereafter, shortly before consummation of the merger, the Brotherhood made application to the National Mediation Board for an interpretative ruling regarding the post-merger applicability of the Brotherhood-Capital agreement to United. This application was made under Section 5, Second, of the Railway Labor Act (45 U.S.C. § 155, Second), which requires the Board to give an "interpretation" of "the meaning or the application of any agreement reached through mediation under the provisions of this chapter" upon application by any party to such an agreement. The Brotherhood-Capital agreement of August 3, 1959, had been reached through such Board mediation. (R. 5; see Section 5, First, of the Railway Labor Act, 45 U.S.C. § 155, First.) After a hearing on the Brotherhood's application, the Board,

on August 25, 1961, held that "the language of * * * the [Brotherhood-Capital] agreement of August 3, 1959, reading 'all provisions of this agreement shall be binding upon the successors and assigns of the company' is clear and unambigous. In other words, the language means just what it says and we so find" (R. 41, 44). The Board went on, however, to hold that Section 5, Second, of the Railway Labor Act "delegates no authority to this Board to interpret or construe the merger agreement, which is a document foreign to its processes. * * * [T]his Board lacks jurisdiction to do anything more by interpretation than to construe the instrument produced through its mediatory function. * * * In sum, we find that the language is clear and unambiguous but fail to find authority to spell out the rights and obligations of the parties in the situation presented here" (R. 44). Thereafter, United continued to refuse to apply the Brotherhood-Capital agreement to the former Capital employees who were transferred to its employ.

The district court dismissed the Brotherhood's complaint[2] "for lack of jurisdiction" (R. 128), and the court of appeals affirmed (R. 131). Both courts held

[2] Several bases of federal jurisdiction were urged in the complaint filed on November 9, 1961 (R. 3–4). Regardless of the validity of the other bases urged, the suit requests a declaration of the applicability of a collective agreement containing adjustment board procedures as required by Section 204 of the Railway Labor Act (45 U.S.C. § 184). Federal jurisdiction under Sections 1331 and 1337 of the Judicial Code (28 U.S.C. §§ 1331, 1337) would thus seem to exist under the holding of *Machinists* v. *Central Airlines*, 372 U.S. 682.

that the Brotherhood's suit against United was a "representation dispute" under Section 2, Ninth, of the Railway Labor Act (45 U.S.C. § 152, Ninth) and that judicial power was therefore wholly excluded under the doctrine of *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297; *General Committee* v. *Missouri-Kansas-Texas Railroad Co.*, 320 U.S. 323; *General Committee* v. *Southern Pacific Co.*, 320 U.S. 338. This Court granted certiorari (R. 139).

DISCUSSION

1. Contrary to the decisions below, we believe that the present controversy between the Brotherhood and United is not a dispute under Section 2, Ninth, of the Railway Labor Act. That Section provides a means for determining the representative of employees covered by the Act. "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class * * *" (Section 2, Fourth). When there is a "dispute" "as to who are the representatives of * * * employees," Section 2, Ninth, provides that either party to the dispute may require the National Mediation Board to make an investigation (which may include an election among the employees involved) and to designate and certify the representative. Under the cases cited by the courts below (*Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297; *General Committee* v. *Missouri-Kansas-Texas Railroad Co.*, 320 U.S. 323; *General Committee* v. *Southern Pacific Co.*, 320 U.S. 338), jurisdiction to

determine a representative under this procedure is exclusively committed to the Board. Therefore, if the dispute in this case were over the selection or determination of a representative of United's present employees for purposes of collective bargaining, the Board would clearly have exclusive jurisdiction.

The present dispute, however, does not concern the determination of a representative for the future. This controversy is over the present effect of a contract negotiated by a representative previously selected by Capital's employees under the Section 2, Ninth, procedure. The distinction becomes apparent when it is considered that a separate representation proceeding under Section 2, Ninth, has, indeed, been commenced with regard to the employees in this case. On August 24, 1962, shortly after the district court's opinion was filed, the Brotherhood requested the Board to institute an investigation under Section 2, Ninth, pertaining to the employees presently working at United in the crafts where the Brotherhood formerly represented employees at Capital. That group includes employees who have always been with United and also employees formerly with Capital and allegedly presently covered by the agreement in suit. An election ordered in this unit by the Board pursuant to Section 2, Ninth, has not yet taken place because of litigation over the form and scope of the proposed election.[3] Once the election

[3] R. 135; see *Association for the Benefit of Non-Contract Employees* v. *National Mediation Board*, 218 F. Supp. 114 (D.D.C.); *United Airlines, Inc.* v. *National Mediation Board*, 330 F. 2d 853 (C.A.D.C.). Petitions for certiorari filed by the Brotherhood, United and the Board are now pending in these cases. (Oct. Term, 1964, Nos. 138, 139 and 369.)

does take place, the representative selected will thereafter be exclusively entitled to represent the employees in the unit for purposes of negotiating with United.

This case relates to the present—the interim status of labor relations *until* an election takes place and a representative is selected under Section 2, Ninth.[4] The dispute is caused by the fact that the unit for which an agreement was negotiated has been divided and absorbed into two larger units in which a new representation proceeding has not yet been concluded. The question here is not who will ultimately be the Section 2, Ninth, representative certified by the Board. Nor is it even what effect a new certification will have upon the old agreement. The question is to what extent the Brotherhood-Capital agreement continues to be applicable to the employment relations between United and the former Capital employees in the period after the merger but before the selection of a representative for the merged unit. The Brotherhood seeks to establish that, regardless of which union, if any, might ultimately be designated to represent United's employees, it was incumbent upon United to

[4] United, however, might potentially seek to terminate the agreement even before the election takes place by filing a notice pursuant to Article 44 of the agreement (R. 36) and Section 6 of the Railway Labor Act (45 U.S.C. § 156). United has not thus far attempted such a termination. Should the election result in the selection of a new representative, that representative and United would seem clearly to have the authority to terminate the Brotherhood-Capital agreement under Section 6. In the event that the election results in the selection of no representative, termination of the agreement according to Section 6 might also be sought.

honor the Brotherhood-Capital agreement at least until that agreement was altered in accordance with the procedures prescribed by the Act (Section 6, 45 U.S.C. 156).[5] The Board's authority under Section 2, Ninth, does not permit it to adjudicate this contractual relationship between employer and union pending the outcome of a representation proceeding.[6]

[5] Among the contractual rights which the Brotherhood asserts that United refuses to honor are "matters relating to seniority, basis of pay; protection against arbitrary discipline and discharge, procedures for the adjustment of grievances and against arbitrary transfer, provisions for the health and safety of employees, and various benefits such as sick leave allowances, overtime allowances, group insurance and pension benefits, maintenance of union membership and check off of union dues" (R. 8).

[6] It might be argued that, since the Capital-Brotherhood agreement was reached through mediation by the Board, the Board may have authority under Section 5, Second, of the Act (45 U.S.C. § 155, Second) finally to declare whether and to what extent the agreement governs United pending the Section 2, Ninth, representation proceeding. As stated *supra*, pp. 5–6, a request that the Board make such a determination was directed to the Board by the Brotherhood. The Board decided, however, that its authority pursuant to Section 5, Second, only extended to construing the agreement reached through its mediation, and did not permit it to decide the effect of a merger upon the continued applicability of the agreement (R. 44). The Board has traditionally taken a narrow view of its function under Section 5, Second, believing that disputes regarding the meaning of agreements should ordinarily be resolved through the appropriate adjustment board provided by Sections 3 and 204 of the Act (45 U.S.C. §§ 153, 204). See, *e.g.*, *In the Matter of Brotherhood of Maintenance of Way Employes and Akron & Barberton Belt Railroad Co.*, reproduced in Interpretations Issued by the National Mediation Board pursuant to Section 5, Second, of the Railway Labor Act, July 1, 1934–June 30, 1961, p. 149. If the Board were

2. Our conclusion that this case does not involve a representation dispute under Section 2, Ninth, does not mean that all the issues are appropriate and ripe for judicial consideration. Section 204 of the Railway Labor Act creates procedures for resolution through arbitration of "disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions * * *." (45 U.S.C. § 184.) When such disputes arise, they are to be handled "in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board * * *." Section 204 places upon "every carrier and * * * its employees, acting through their representatives" the duty

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of the view that the Brotherhood-Capital agreement were wholly inapplicable to United, it might, nevertheless, have fully resolved this dispute under Section 5, Second. The Board, however, has already expressed its view that, as a matter of the agreement alone, it *is* applicable to United. In so doing, the Board did not mean to foreclose consideration of the extent to which particular portions of the agreement might not be applicable to United in light of the changed circumstances caused by the merger. We urge, on behalf of the Board, that the Board, acting under Section 5, Second, would be an inappropriate forum for the resolution of these questions regarding the specific application of particular provisions of the collective agreement after the merger. The Board believes that the Act commits such questions to an adjustment board created under Section 204, and we so submit, *infra*.

"to establish a board of adjustment" which may be established by "agreement between employees and carriers." Article 43 of the Brotherhood-Capital agreement, which the Brotherhood seeks to enforce against United in this case, established such a board of adjustment (R. 32).

Whether, and to what extent, United is bound by the Brotherhood-Capital agreement pending resolution of the representation proceeding presently pending before the Board are questions plainly appropriate for arbitration by the adjustment board,[7] unless it can be said, out of hand, that the agreement to arbitrate is itself no longer viable because of the merger. The latter question, to be sure, is an issue for judicial determination. However, this Court has already provided an unequivocal answer in other litigation and need only declare its application to this case.[8]

In *John Wiley & Sons.* v. *Livingston,* 376 U.S. 543, a company (Interscience), which was a party to a collective bargaining agreement, merged with another, larger, company (Wiley), whose employees were unrepresented. The suit was to compel Wiley to submit a grievance to arbitration under the collective agree-

[7] The questions raise a "minor" rather than a "major" dispute under the terminology of *Elgin, Joliet & Eastern Ry. Co.* v. *Burley,* 325 U.S. 711. See *Auxico Airlines, Inc.* v. *Air Line Pilots Ass'n, Int.,* 331 F. 2d 433 (C.A. 5).

[8] If, as we believe, the law on this point is clear, we suggest that this Court should decide the issue rather than defer pending consideration by the courts below. The dispute has already been long protracted. Cf. *O'Leary* v. *Brown-Pacific-Maxon,* 340 U.S. 504, 508.

ment between the union and Interscience. In language fully applicable to the present case, the Court said (*id.* at 548–551):

> * * * the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement, and * * * in appropriate circumstances, present here, the successor employer may be required to arbitrate with the union under the agreement.
>
> * * * It would derogate from "the federal policy of settling labor disputes by arbitration," *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596, if a change in the corporate structure or ownership of a business enterprise had the automatic consequence of removing a duty to arbitrate previously established; this is so as much in cases like the present, where the contracting employer disappears into another by merger, as in those in which one owner replaces another but the business entity remains the same.
>
> * * * * *
>
> The preference of national labor policy for arbitration as a substitute for tests of strength between contending forces could be overcome only if other considerations compellingly so demanded. We find none. * * *
>
> We do not hold that in every case in which the ownership or corporate structure of an enterprise is changed the duty to arbitrate survives. * * * [T]here may be cases in which

> the lack of any substantial continuity of identity in the business enterprise before and after a change would make a duty to arbitrate something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved. So too, we do not rule out the possibility that a union might abandon its right to arbitration by failing to make its claims known. * * * In addition we do not suggest any view on the questions surrounding a certified union's claim to continued representative status following a change in ownership. * * * This Union does not assert that it has any bargaining rights independent of the Interscience agreement; it seeks to arbitrate claims based on that agreement, now expired, not to negotiate a new agreement.

The present case, in at least two respects, provides an even stronger basis for compelling the surviving company to arbitrate under the collective agreement. United's duty to arbitrate here flows from the Railway Labor Act, whereas in *Wiley* the duty was solely contractual. Here, then, the "preference of national labor policy for arbitration" has found expression in a congressional directive addressed to the very industry involved in the dispute. Here, also, the collective agreement with Capital (embodying the statutory arbitration procedure) expressly provided that it was to govern Capital's successor in a merger; the agreement in *Wiley* was silent in that regard.

We note additionally that the CAB, although fully aware of the problem, did not state any reasons pecu-

liar to its regulation why United should not be bound to arbitrate the applicability of the Brotherhood-Capital agreement under the adjustment board procedure of the Railway Labor Act. It explicitly relegated that question to the "regular procedures" governing labor relations.

It thus seems clear that no principle of law necessarily exempts United from the Brotherhood-Capital agreement, and that the precise extent to which United may be bound is an appropriate question for arbitration under the statutory procedures embodied in that agreement. In these circumstances, the adjustment board has exclusive primary jurisdiction to consider the disputes, *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239; *Order of Conductors* v. *Pitney*, 326 U.S. 561; *Aaxico Airlines, Inc.* v. *Air Lines Pilots Ass'n, Int.*, 331 F. 2d 433 (C.A. 5), subject only to limited judicial review, cf. *Union Pacific R. Co.* v. *Price*, 360 U.S. 601; *Machinists* v. *Central Airlines*, 372 U.S. 682. While the judgments below holding that jurisdiction was wholly lacking should therefore be reversed, judicial consideration of this case at this time should not go beyond a declaration that the dispute between the Brotherhood and United is amenable to arbitration under the adjustment board procedures established pursuant to Section 204 of the Act by the Brotherhood-Capital agreement.

CONCLUSION

We respectfully submit that the Court should reverse the judgment below and remand the cause to

the district court for proceedings not inconsistent with an opinion holding that the dispute between the Brotherhood and United is subject to the exclusive primary jurisdiction of an appropriate adjustment board.

Respectfully submitted.

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AUGUST 1964.

APPENDIX

The relevant portions of the Railway Labor Act (Act of May 20, 1926, 44 Stat. 577, as amended, as set forth in 45 U.S.C. §§ 151–188) are as follows:

SEC. 152 [Sec. 2]. *General duties.*

* * * * *

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden.

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assess-

ments, or other contributions: *Provided,* That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

* * * * *

Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections.

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in

the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

* * * * *

SEC. 155 [Sec. 5]. *Functions of Mediation Board.*

* * * * *

Second. Interpretation of agreement.

In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this chapter, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

* * * * *

SEC. 184 [Sec. 204]. *System, group, or regional boards of adjustment.*

The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in

this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of sections 181–188 of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in sections 151–163 and 181–188 of this title shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of sections 181–188 of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction. (May 20, 1926, ch. 347, § 204, as added Apr. 10, 1936, ch. 166, 49 Stat. 1189).

U.S. GOVERNMENT PRINTING OFFICE: 1954